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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

<p>N.G. AND L.G., minors, by and through their Guardian ad Litem, Lilliana Magallon; SARA PEREZ. Plaintiffs, vs. COUNTY OF LOS ANGELES; LEROY BACA, DAVID CHEVEZ, LAURENCE SWANSON, DOES 5 – 10. Defendants</p>	<p>) Case No.: CV13-008312-SVW (FFMx))) PLAINTIFFS' MEMORANDUM OF) CONTENTIONS OF LAW AND) FACT)) TRIAL: August 12, 2014) PTC: July 28, 2014) TIME: 3:00 p.m.) CTRM: 6)) Assigned to the Honorable Stephen J.) Wilson, United States District Court) Judge</p>
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TO THE HONORABLE COURT, ALL PARTIES, AND COUNSEL
 HEREIN: Plaintiffs hereby submit this Memorandum of Contentions of
 Fact and Law pursuant to Local Rule 16-4 in anticipation of the Final
 Pretrial Status Conference on July 28, 2014.¹

¹Plaintiffs will submit an ex-parte application to continue the trial,
 pretrial and related dates due to witness unavailability and the need to
 complete expert discovery. Defendants declined to stipulate.

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1 **Plaintiffs' Memorandum of Contentions of Law and Fact**

2 **I. INTRODUCTION**

3 This action arises from the fatal shooting of Jilberto Gutierrez,
4 father and son of Plaintiffs. At the time he was shot, Mr. Gutierrez was
5 a patient at Centinela Hospital, admitted to the emergency department,
6 and brought in by defendants Los Angeles County Sheriff Deputies
7 David Chevez and Lawrence Swanson. He had been arrested 11 hours
8 earlier for a non-violent offense. He was taken to the hospital after
9 complaining of dizziness and chest pain. He later declined medical care.

10 Mr. Gutierrez was shot through the top of his head while
11 handcuffed by one hand to the bed rail of the hospital gurney on which
12 he had been (or was) laying. The circumstances of the shooting are hotly
13 contested. Numerous nurses and a treating doctor testified that
14 decedent was calm and cooperative throughout the time leading to the
15 subject incident. They never heard him raise his voice or act in an
16 aggressive manner.

17 Several nurses heard a commotion shortly after 1 a.m. which
18 sounded like arguing. It was also reported that there was a sound like
19 the handcuff moving laterally upon the bed rail. One of the nurses
20 entered the room in time to see the deputy near the head of the bed
21 using overhand strokes downward onto the patient with an ASP baton
22 toward or upon the prone patient. With his free right hand, Gutierrez
23 attempted to protect himself from the numerous blows being struck by
24 Defendant Chevez. Deputy Swanson reportedly stood near the foot of
25 the bed, approximately two feet away. One witness described the scene
26 as "surreal" and partially closed the curtain and moved to leave the
27 room. Another nurse witness saw the prone patient's legs beyond the
28 half-pulled privacy curtain and a deputy standing by the foot of the bed

1 apparently physically uninvolved with the patient whose legs were
2 moving up and down, as though bicycling. This nurse saw the feet of
3 someone near the head of the bed engaged in some activity. This was the
4 same deputy seen by the other nurse making overhand strikes to the
5 prone patient.

6 Although defendants claim an elaborate scenario involving the
7 handcuffed Gutierrez reaching for a holstered weapon, these nurse and
8 other independent eyewitnesses dispute this version.

9 Defendants' version of the incident is that decedent reached to his
10 left, over his handcuffed left wrist, to grab the holstered firearm of
11 Deputy Swanson who claims he pressed down on Gutierrez's right hand
12 on the firearm grip to retain the firearm in its specially designed "high
13 retention" holster. Defendants claim that Deputy Chevez then punched
14 Guteirrez in the face 5 to 10 times, struck him over the head with 10 to
15 15 ASP baton blows, then Deputy Swanson removed one of his two
16 hands over decedent's right hand, deployed pepper spray, *then* decedent
17 released his grip of the weapon. It is then claimed by defendants that
18 decedent, despite the foregoing battering, leaped over the bed rail to
19 which he was still handcuffed and attempted vainly to reach for Deputy
20 Swanson's still holstered weapon as Swanson continued to back away.
21 Decedent reached full extension handcuffed to the 320 to 343 pound
22 gurney and never came closer to Swanson – per defendants' version –
23 than two feet. It was at that time, that defendants claim that the fatal
24 shooting occurred. That claim is not supported by any independent
25 witnesses or any scientific evidence. Reportedly, the Sheriff's
26 Department sampled Swanson's holster and handgun for fingerprints
27 and DNA, but no report of any results has been provided in discovery or
28 otherwise.

1 Even by Defendants' version, decedent was not touching or holding
2 the firearm when fatally shot through the top of his head, by defendant
3 Chevez. This shooting was ostensibly from decedent's left – still
4 handcuffed by his left hand to the gurney's railing – was standing and
5 reaching for Deputy Swanson some two feet away, as Swanson backed
6 further away. Yet decedent was shot on the top of the *right side* of his
7 head. Defendants' sworn version of the incident, subscribed to by both
8 defendants, was not possible according to the Deputy Medical Examiner,
9 Cho Lwin, M.D., who examined the wound track during the autopsy.

10 The wound track observed at autopsy in decedent's head, entered
11 the (top) right parietal area, went sharply downward with a slight right
12 to left deviation according to Los Angeles County Deputy Medical
13 Examiner Cho Lwin, M.D. According to Lwin, he observed the wound
14 track to go sharply downward, severing the brain stem and coming to
15 rest in the pharynx (at the back of the throat.)

16 Dr. Lwin was shown a photograph of Chevez's demonstrated
17 shooting position sworn to by defendant Chevez and Chevez's sworn to
18 position of decedent at the moment of the shooting (also demonstrated
19 and photographed) then Dr. Lwin stated that the wound track he
20 discovered would not have occurred from those respective positions.

21 The parties have just exchanged voluminous expert reports and
22 exhibits; rebuttal expert designation is pending, but expert discovery has
23 not commenced, though the currently scheduled trial date is mere weeks
24 away.

25 Additionally, Defendants filed a motion for partial summary
26 judgment, which Plaintiffs opposed, upon which the Court must rule,
27 which may also affect the presentation of evidence in the case.

28 The Court bifurcated and stayed discovery as to the *Monell* claims

1 against the County and the state law claims (the fourth, fifth, sixth, and
 2 seventh causes of action) pending adjudication of the constitutional
 3 claims against the individual deputies. (See Docket No. 28.)
 4

5 **II. CLAIMS AND DEFENSES (Local Rule 16-4.1)**

6 **A. At trial, Plaintiffs plan to pursue the following claims against the**
 7 **following defendants:**
 8

9 **Claim 1:** Plaintiffs N.G., and L.G. have abandoned this claim against
 10 Deputy Kelley-Eklund ,Deputy Gomez and Doe 5; a Rule 41 dismissal
 11 will be filed shortly.
 12

13 **Claim 2:** Unreasonable search and seizure –Excessive Force (42 U.S.C. §
 14 1983) by Plaintiffs N.G., and L.G. against Deputy Chevez. Plaintiffs
 15 contend that Defendant Chevez used excessive (and deadly) force against
 16 their decedent in violation of his Fourth Amendment rights and 42 U.S.C.
 17 § 1983. Plaintiffs bring this claim in their individual capacities and as
 18 successors in interest to decedent. They seek wrongful death damages,
 19 punitive damages and reasonable attorneys fees under federal law for this
 20 claim. Defendants Chevez and Swanson were acting under color of law at
 21 the time of the incident.
 22

23 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS' SECTION** 24 **1983 CLAIMS:**

25 As a threshold matter, actions brought under 42 U.S.C. § 1983 requires that
 26 Plaintiffs prove the following by a preponderance of the evidence:

- 27 1. The deputy used excessive force against the decedent and
- 28 2. The excessive force was a cause of injury, harm, pain, suffering and

1 loss of life to Mr. Gutierrez and a cause of the resulting injury, damage, loss
2 and harm to Plaintiffs. *See* 9th Cir. Man. of Model Jury Instr., § 9.22 (2007).

3
4 **Claim 3:** Interference with Familial Relationship (42 U.S.C. § 1983) by
5 Plaintiffs N.G., L.G., and Sara Perez against Deputy Chevez and Deputy
6 Swanson.

7 The use of deadly force against decedent violated Plaintiffs' Fourteenth
8 Amendment substantive due process right to a continued familial relationship,
9 companionship and society with their father and son. *Strandberg v. City of*
10 *Helena* 791 F.2d 744 (9th Cir. 1986); *Smith v. City of Fontana* 818 F.2d 1411,
11 140 (9th Cir. 1987) overruled on other grounds by *Hodgers-Durgin v. de la Vina*
12 199 F.3d 1037 (9th Cir. 1999). Both parents and children of a decedent have been
13 found to have Fourteenth Amendment protected liberty interest in a continued
14 familial relationship. *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th
15 Cir.1991).

16 Plaintiffs bring this claim in their individual capacities and seek recovery
17 for loss of their decedent's love, companionship, comfort, care, assistance,
18 protection, affection, society, moral support, and seek damages, punitive
19 damages and attorneys fees under federal law for this claim.

20
21 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS'**
22 **FOURTEENTH AMENDMENT CLAIMS:**

23 1. Defendants acted with deliberate indifference to the decedent's rights;
24 *See, Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008). Further, whether
25 Plaintiffs must prove that Defendants acted with "purpose to harm unrelated
26 to a legitimate law enforcement objective" depends on the jury's factual
27 determinations as to whether the officer defendants had time to deliberate.
28

Claim 4: Municipal liability (42 U.S.C. § 1983) by Plaintiffs N.G. and L.G. against Defendant County. This claim was stayed by the Court to be heard at a later date. See Docket. No. 28.

Claim 5: Wrongful Death by Plaintiffs N.G. and L.G. against Defendants Chevez, Swanson, Doe 5. This claim and discovery thereon was stayed by the Court to be heard at a later date. See Docket. No. 28.

Plaintiffs seek wrongful death damages under state law for this claim and allege that the County of Los Angeles is vicariously liable for defendants' conduct for this claim. Plaintiffs contend that Defendants were negligent in their pre-shooting tactics and in the use of deadly force against the decedent.

Under California negligence law, "peace officers have a duty to act reasonably when using deadly force" *Hayes v. County of San Diego* 57 Cal. 4th 622, 629 (2013); *Munoz v. Olin* 24 Cal.3d 629, 634 (1979); *Grudt v. City of Los Angeles* 2 Cal.3d 575, 587 (1970). Whether the officers were negligent in their use of force must be considered under the totality of circumstances... including the officers' actions preceding the use of deadly force... "that are part of the continuum of circumstances surrounding a single use of deadly force." *Hayes, supra*, 57 Cal 4th at 637-8

Claim 6: Battery by Plaintiffs N.G. and L.G. against Defendants Chevez and Swanson. This supplemental state claim was stayed by the Court to be heard at a later date. See Docket. No. 28.

Plaintiffs contend that Defendants used unreasonable force against decedent when Defendant Chevez shot and killed Mr. Gutierrez, causing his death. *Munoz v. City of Union City* 120 Cal.App. 4th 1077. Plaintiffs seek wrongful death damages, punitive damages and attorneys fees under state

1 law for this claim.

2 In the context of a police officer's use of force, a state law battery claim
3 is a counterpart of a federal excessive force claim and similar standards
4 apply. *Brown v. Ransweiler* 171 Cal.App.4th 516, 527 (2009); *Edson v. City*
5 *of Anaheim* 63 Cal. App. 4th 1269, 1274-75 (1998)

6
7 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS' BATTERY**
8 **CLAIM:**

- 9 1. Defendants used unreasonable force against Mr. Gutierrez
10 2. Mr. Gutierrez did not consent to that use of force
11 3. Defendants' use of unreasonable force was a substantial factor in
12 causing Mr. Gutierrez' death. See, CACI 1305.

13
14 **Claim 7:** Negligence by Plaintiffs N.G. and L.G. Defendants against Chevez
15 and Swanson. This claim was stayed by the Court to be heard at a later date.
16 See Docket. No. 28.

17
18 **(C) In brief, the key evidence Plaintiffs rely on for each of their**
19 **claim is:**

- 20 (a) testimony of the Plaintiffs
21 (b) testimony of Defendant Chevez
22 (c) testimony of Defendant Swanson
23 (d) Testimony of several witnesses, including Jacob Marhefky, Kimberly
24 King, Erendira Sanchez-Soto, Bettye Chism, all nurses at the hospital
25 where the shooting occurred;
26 (e) Testimony of Dr. Arnold Sin, MD, emergency room treating doctor
27 (f) Testimony of Los Angeles County Medical Examiner Cho Lwin, M.D.
28 (g) Testimony of Plaintiff's experts Ronald Scott, ballistics, Thomas

1 Streed, Ph.D., crime scene analysis, police practices expert, Jesse
2 Wobrock, Ph.D., biomechanics, scene reconstruction, one or more
3 rebuttal experts to be designated by Plaintiffs.
4 (h) Testimony of observations and actions taken by Los Angeles County
5 Sheriff's Department investigators Salerno, Duval, Maxwell and Short.
6 (i) Photos of the scene
7 (j) Photos of decedent at scene after shooting
8 (k) Autopsy report and selected photographs therefrom²
9 (l) Police reports
10 (m) Testimony of Alex Strouzer, Brenda Shafer, Margaret Kaleuati,
11 Maryan Nickooshiam, Ronald Scott concerning bullet impact,
12 trajectories, stippling, gunshot residue, fingerprint, DNA analysis and
13 other physical/scientific evidence
14 (n) Plaintiff's funeral and burial expenses
15 (o) Photographs of decedent with Plaintiffs and family members
16 (p) Reference to original statements and depositions of the involved
17 officers and witnesses.
18 (q) Testimony of Evelyn Davis and Felix Travis.
19 (r) Plaintiffs' Rebuttal Witness(es) To Be Designated.
20 (s) Plaintiffs' Expert Economist Robert Johnson or James Mills
21 regarding economic impact of wrongful death/ violation of civil rights of
22 Plaintiffs and their decedent Jilberto Gutierrez.

23 24 **III. ANTICIPATED EVIDENTIARY ISSUES**

25 Plaintiffs filed the following Motions in Limine:
26 Motion in Limine No. 1: to Exclude Evidence, Argument, or
27 Reference to Decedent's tattoos;

28

²Plaintiffs have moved *in limine* to exclude decedent's tattoos from being shown.

1 Motion in Limine No. 2: to Exclude Evidence of Gutierrez alleged
2 gang affiliation or membership;

3 Motion in Limine No. 3: to Exclude Evidence, Argument, or
4 Reference to Prior Arrests, Convictions and Other Bad Acts;

5 Motion in Limine No. 4: to Exclude Evidence That Prior to October
6 17, 2012 The Decedent Had Possessed, Sold, or Used Illegal Drugs or
7 Alcohol;

8 Motion in Limine No. 5: to Exclude Evidence That Decedent Had
9 Possessed Drugs on October 17, 2012 and was under the influence on
10 October 18, 2012;

11 Motion in Limine No. 6: to Exclude Evidence of Accolades, Awards
12 or Certificates Received By Defendants or Witnesses;

13 Motion in Limine No. 7: to Exclude Documents, Witnesses and
14 Opinions Not Properly Disclosed by Defendants or by Defendants'
15 Experts;

16 Motion in Limine No. 8: to Exclude Evidence or Argument to
17 Jurors that they Ought to Imagine Themselves in the Same Position as
18 or Put Themselves in the Shoes of Defendants;

19 Motion in Limine No. 9: to Exclude Evidence that Decedent was "a
20 Felon" and that he was on Probation;

21 Motion in Limine No. 10: to Exclude Evidence, Inference or
22 Argument of Any Adverse Consequences that One or More Defendants
23 May Suffer as a Result of a Plaintiffs' Verdict.

24 Defendants filed the following Motions in Limine, which Plaintiffs
25 opposed (with two exceptions):

26 Defendants' Motion in Limine #1 to exclude evidence of deputy
27 tattoos;

28 Motion in Limine No. 2: to Exclude Evidence of or Reference to FBI
or Other Investigations Involving the LASD (Not Opposed);

1 Motion in Limine No. 3: to Exclude Evidence of or Reference to
2 Stayed Portions of the Case;

3 Motion in Limine No. 4: to Exclude Evidence of or Reference to
4 Other Shootings;

5 (There is no Motion in Limine #5 filed by Defendants.)

6 Motion in Limine No. 6: to Exclude Evidence Relating to What
7 Deputies Could or Would Have Done Differently;

8 Motion in Limine No. 7: to Exclude Accident Reconstruction by the
9 Coroner, Dr. Lwin;

10 Motion in Limine No. 8: to Exclude Evidence, Testimony or
11 Argument Regarding the Opinion by the Coroner Dr. Lwin Regarding
12 Baton Strikes and Their Effect on Consciousness;

13 Motion in Limine No. 9: to Exclude Evidence or Opinions Re:
14 Accident Reconstruction by Homicide Investigator;

15 Motion in Limine No. 10: to Exclude Evidence or Reference to the
16 Representation of the Coroner, Dr. Lwin, by Defense Counsel.

17 18 **IV. ANTICIPATED LEGAL ISSUES**

19 Plaintiffs anticipate raising *Daubert*/ Rule 26 non-compliance,
20 foundation objections to Defendants' designated experts Delhauer,
21 Spiehler, Trompetter and Hoffman, *inter alia*. Plaintiffs' objections may
22 take the form of a pre-trial motion or *voir dire* of the purported experts
23 under FRE 104.

24 Plaintiffs further anticipate that Defendants will assert the
25 affirmative defense of qualified immunity. However, this is a legal issue
26 to be determined by the Court, if at all, and not by the jury.

27 28 **V. BIFURCATION**

The Court has already bifurcated the Monell 1983 claim to be tried

1 separately, and the state law causes of action for wrongful death, battery
2 and negligence. See Docket No. 28.

3 On February 27, 2014, the Court bifurcated trial of the § 1983
4 claims from the state law claims, and bifurcated trial of the § 1983 claims
5 against the individual deputies from the § 1983 claim against the County
6 in accordance with *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th
7 Cir. 1996). The Court stayed discovery on the fourth, fifth, sixth and
8 seventh causes of action.

9 10 **VI. JURY TRIAL**

11 Plaintiffs made a timely demand for trial by jury. Plaintiffs will
12 seek an ex-parte application to continuance of trial due to unavailability
13 of witnesses, additional time to complete expert depositions and
14 Defendants' failure/refusal to stipulate to such a continuance.

15 16 **VII. ATTORNEYS' FEES**

17 If plaintiffs' prevail at trial, they are entitled to an award of
18 attorneys' fees pursuant to 42 U.S.C. 1988, *Hensley v. Eckhart* 461 U.S.
19 424, 429 (1983), and under state law pursuant to California Civil Code
20 Section 1021, et seq.

21 22 **VIII. ABANDONMENT OF ISSUES**

23 After meeting and conferring, Plaintiffs agreed to dismiss all claims
24 against Deputies Gomez and Kelley-Eklund, therefore all claims relating
25 to false arrest and false imprisonment have been abandoned.

26 DATED: July 20, 2014

Respectfully Submitted,

27 /s/Gary S. Casselman, Esq.
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